United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1037 B P/S.

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-vs-

ROBERT JERMAIN,

Defendant-Appellant.

Docket No.
~~74-1036~~
74-1037

BRIEF AND APPENDIX FOR DEFENDANT-APPLELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT JERMAIN,

Docket No. : 74-1036

Defendant-Appellant.

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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

I. THE TRIAL COURT ERRED IN NOT INSTRUCTING JURY ON TESTS FOR MULTIPLE CONSPIRACY AND IN NOT EXCLUDING CONFORTI TESTIMONY.

II. APPELLANT, ROBERT JERMAIN, ADOPTS BY REFERENCE, ALL ARGUMENTS IN THE CAPRA, GUARINO, DELLACAVA AND MORRIS BRIEFS WHERE APPLICABLE.

STATEMENT PURSUANT TO
RULE 28 (3)

Preliminary Statement

This appeal is from a judgment of the United States District Court, Southern District of New York, (Frankel, J.) convicting defendant, Robert Jermain, after trial by jury, of conspiracy to violate Federal Narcotics Laws and substantive violations of those laws. The judgment was entered on January 3, 1974 and resulted in a sentence of 12 years imprisonment on the conspiracy count and on each of the 4 substantive counts, to run concurrently and with a special parole period of 3 years. Defendant was granted leave to appeal in Forma Pauperis.

Facts

The Indictment

Robert Jermain was charged by indictment 73 CR 460 to be part of a conspiracy to violate the United States Narcotics Laws.[1] In addition, he was charged with

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1. Title 21 USC Sec. 812, 841(a)(1) and 841(b)(1)(a)
Title 26 USC Sec. 4705(a) and 7237(b)

possession, constructive and actual, under the substantive counts of the indictment. Specifically, the indictment and the Bill of Particulars supplementing it, alleges that for a period from July 1, 1969 until April, 1973, Robert Jermain was a participant in a single, all encompassing, drug conspiracy involving no less than 22 named conspirators operating on at least 3 levels of supply and distribution. In reality, the evidence most favorable to the Government shows several unrelated conspiracies. Count 1 of the indictment alleges the general conspiracy. The substantive counts are as follows:

Count II - Alleged sale of 2 kilos of heroin during the third week of August, 1970.

Count III -Alleged sale of 1 kilo of heroin on November 6, 1970.

Count IV - Alleged sale of 5 1/2 kilos of heroin in October, 1971.

Count V - Alleged sale of 1 kilo of cocaine in October, 1971.

Of the named defendants, 6 went to trial[2]

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2. Capra, Guarino, Dellacava, Jermain, Harris and Morris. Harris and Morris were charged with one count of conspiracy. Capra, Guarino and Dellacava were charged with 4 additional substantive counts.

and the remaining 5 defendant were severed.[3]

The Conspiracy - The formative days. Summer of 1969.

The complex and detailed proof adduced at the trial is fully set forth in the briefs filed by appellants Capra, Guarino and Dellacava. It would serve no useful purpose in reviewing all of the significant evidence. It is of some importance however, to review the relative involvement of the conspirators and their relationship, if any, to each other.[4]

Central to the government's case was the testimony of Joaquin Ramos. Ramos purported to outline a large-scale narcotics distribution network. Ramos begins his tale upon his release from a Federal Penitentiary after completing a 17 year sentence for a narcotic violation. The time is the summer of 1969 (141)*. Through a friend,

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3. Messina, Brown and Caruso were fugitives. Earl Sims pleaded guilty and testified as a government witness.

4. The trial involved 44 government witnesses, over 4100 pages of transcript, 6 weeks of trial and 144 government exhibits.

* References are to pages in the record.

Marco Delguardo, he is introduced to defendants, Capra, Guarino and Dellacava, who offer to "start him up" in the narcotics business by giving him narcotics on consignment (148-149).

Subsequently, Ramos forms a partnership with a former friend, one Alex Metro, who is advised of Ramos' source of supply.

In addition to the Ramos-Metro team, Capra-Guarino-Dellacava were allegedly providing defendant, Jack Brown with narcotics on similiar terms.

Exit Metro - Enter Jermain - Ramos' Tale

In early 1970, the Metro-Ramos partnership dissolved (181-182) and Ramos was introduced to Jermain by Capra and Guarino (183). Allegedly, Jermain and Ramos united and continued receiving "goods" from the Capra-Guarino-Dellacava group in a manner similiar to Brown and Metro-Ramos.

Among the Jermain-Ramos customers were co-conspirator, Jimmy Rosa, co-defendants George Harris and Alan Morris.[5] Linked to Harris, presumably as aides and

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5. Morris was known to Harris who were both Detroit operators. Both, however, operated independently of each other. Among Morris' confederates were co-conspirators Willie Middlebrook and Harold McSpadden. Neither knew of or had any relationship with Jimmy Rosa.

confederates, were defendant Earl Sims and Stanley Mirable.

There follows a period of 1 1/2 years during which time the Ramos and Jermain partnership presumably functioned more or less smoothly. During this period, alleged sales of heroin were made to Harris and Morris.

The Toledo Arrest - October 1971.

One day in early October, 1971, Ramos met with Capra-Guarino-Dellacava and defendant, Jermain, concerning a shipment of 6 kilos of heroin and 1 kilo of cocaine to the Morris group via Toledo, Ohio.[6] (433) The shipment was to be enclosed in a suitcase, checked in the baggage room at the Toledo Railway Station and the receipt mailed to Morris.

On October 20, 1971, the suitcase was checked at the Penn Central Railroad Station (1734). On October 28, 1971, the suitcase was opened (1747), the drugs seized[7] and on November 10, 1971, Ramos was arrested (451) which

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6. GX 1C introduced at trial indicated the seizure of the Toledo shipment involved not 6 kilos of heroin, but only 5 1/2.

7. Morris, McSpadden and Middlebrook were arrested when Morris appeared with a receipt and claimed the suitcase.

ultimately led to his trial and conviction for his part in the transaction. From October, 1971, until his arrest in April, 1973, there is no evidence that defendant, Jermain, had any further dealings with the sale or possession of narcotics. For all practical purposes, with the Toledo arrest, the Ramos-Jermain partnership was at an end and the Detroit connection was severed.

The New Conspiracy - The Sperling-Conforti Connection

The government called as a witness, Joseph Conforti, over the strenuous objection of counsel (2413). Conforti testified that he met Herbert Sperling in November, 1971 and subsequently began working for him a "narcotics-mixer" (2404). In the late fall of 1972, more than 1 year after Ramos' arrest and subsequent trial, Conforti first meets the Capra-Guarino-Dellecava group. It is of importance to determine a date as to the alleged Sperling-Capra partnership. The closest date is provided by Conforti when he testifies that on April 7, 1973 he is told by Herbert Sperling, at the Bar Harbour Motel,

> "Things are going to be busy from now on because I'm partners now with Leo (Guarino) and Hooks (Capra); he (Sperling) told me (Conforti), I'd be earning anywhere between 80 to 85,000.00 a year" (2432).

Previously he had only received approximately "4,000.00 total." (2432-2433)

There follows graphic descriptions of Conforti mixing huge quantities of narcotics and the interchange of large amounts of money. It is instructive to set forth some of the testimony so as to better evaluate the effect such testimony would have on a jury.

"Q. What did you see when you arrived in the apartment?
A. Herbie gave Johnny Hooks [Capra] and Leo [Guarino] some money.

Q. Do you know the denominations of the bills they handed over?
A. 50's and 100's.

Q. Do you know how thick each stack was?
A. About an inch." (2425-2426)

. . . . .

"Q. What happened next?
A. John Caruso shows up.

Q. Did he have anything with him?
A. Yes, sir.

Q. What did he have with him?
A. He had an A & P, a brown bag, and when he dumped it on the table there was about eight kilos of pure heroin.

MR. SLOTNICK: I object to the characterization of the substance, your Honor.

MR. FEITELL: Or its purity.

THE COURT: Yes, I will sustain that as of this time. I will strike out the reference to what the substance was.

You may attempt that in some other way, Mr. Feffer.

MR. FEFFER: Fine, your Honor.

Q. What took place when Caruso arrived?
A. He told me we have to wait until, we are going to test it, but we have to wait until Jack [Spada, a named co-conspirator] shows up. He showed about minutes later.

Q. And what took place when Jack arrived?
A. When Jack arrived we started opening up the half kilo bags.

Q. What did you do at that point in time?
A. We were preparing to test the heroin." (2433-2434)

(There follows a description of the testing procedure).

Q. When he returned what did you, John Caruso and Jack Spada then do?
A. We mixed two and a half kilos of pure heroin.

Q. And what did you end up with?
A. 12 to 14-1/2 kilos of mix.

Q. Now, can you tell the Court and jury, how you mixed the heroin, the pure heroin on that occasion?

A. We laid two manila wrapping papers on the floor, you roll them out and you put so many pounds of manite or milk sugar on the floor and you open one bag of heroin and you lay it on top, and you get two pounds more of manite and you lay it on top of the heroin, and you put another half kilo of pure heroin on top of it, until everything is altogether, and you start mixing it with the screens.

Q. And after you mixed it, what happened, what did you do?
A. Well, I start putting the heroin in plastic bags and John will start weighing them by the scale.

Q. How much did you put in each plastic bag?
A. 17-1/2 ounces.

Q. Go ahead.
A. And he'll make sure the weight is right, and when that is done, I start sealing the bags.

Q. What did you seal the bags in?
A. With a heat sealer.

Q. How many times did you cut or dilute the pure heroin?
A. About five times.

Q. Was it possible to cut this heroin further?
A. Yes.

Q. Do you know how many times further it could be cut, approximately?
A. About another three, four times.

Q. Now, after the heroin was placed in the plastic bags and sealed, what took place?
A. Well, John [Caruso] would tell me to put so many half kilos in one bag, and Jack would tell me another, to put 1 amount of half kilos in another, so, to make their deliveries and I would stay behind in the hotel room and clean the hotel room and they would leave.

Q. Now, this mixing took place on the floor of this hotel room, is that correct?
A. Yes, sir." (2436-2438)

Conforti continues his testimony by further describing other instances of his mixing duties. On April 10, 1973, he describes mixing 2 1/2 kilos of "pure heroin" at the Gateway Motel, Merrick, Long Island (2444), and again on April 13, 1973 an additional 2 kilos of heroin (2449).

Throughout Conforti's testimony, mention is made of Capra and Guarino and their alleged connection with

Sperling. It is significant, however, that in all the 239 pages of Conforti's testimony, nowhere is there mention of his ever knowing, meeting or hearing the name of Jermain, Ramos, Harris or Morris. In point of fact, the record is totally devoid of any connection between Sperling-Conforti and Jermain, Ramos, Harris and Morris. Nevertheless, the court permitted this highly prejudicial and inflamatory testimony to be elicited, presumably on the hope that a cautionary instruction would protect defendant, Jermain.

Following the Toledo seizure and the arrest of Ramos and Morris, the government placed taps on Capra, Guarino and Dellacava phones. Nowhere in the record is the name of Robert Jermain or "Bobby" mentioned as having been overheard following October, 1971. Despite this, however, the court in its charge merely instructed the jury that if they found that the defendant, had left the conspiracy, they were not to consider any evidence against him after his withdrawal.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT INSTRUCTING JURY ON TESTS FOR MULTIPLE CONSPIRACY AND IN NOT EXCLUDING CONFORTI TESTIMONY.

It is not without cause that the conspiracy concept has been so long known as the "prosecutor's darling". Justice Jackson referred to it as the "elastic, sprawling and pervasive offense"[8] and Judge Cardoza as the "tendency of a principle to expand itself to the limit of its logic" - and perhaps beyond. The case at bar presents an example of the abuses of the conspiracy charge.

Appellant, Jermain, is mindful of the fact that this Court has repeatedly held that a narcotic conspiracy having its ultimate purpose of placing in the hands of the ultimate purchaser the forbidden commodity is not a

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8. Krulewitch v. U.S. 336 U.S. 440 (1949)

prejudicial variance, and has been referred to as an acceptable "chain" structured conspiracy. U.S. v. Agueci, 310 F2d 817, CA2 (1962); U.S. v. Stromberg 268 F2d 256 CA2 (1959); U.S. v. Cirillo 468 F2d 1233 (1971); U.S. v. Salazar 485 F2d 1272 (1973).

Nevertheless, the structure of the alleged conspiracy in the case at bar is a not a simple, unadulterated "chain". It can better be described as a hybid; somewhere between the "Spoke" conspiracy of Kotteakos[9] and the classic chain conspiracy of a simple narcotic distribution case. Unfortunately, these pictorial concepts are more colorful than helpful. The problem was best expressed by this court in U.S. v. Borelli, 336 F2d 376 (1964) CA2:

> "As applied to the long term operation of an illegal business, the common pictorial distinction between 'chain' and 'spoke' conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower, through exporter and importer, to wholesaler, middleman, and

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9. Kotteakos v. U.S., 328 U.S. 750 (1946).

> retailer, each depending for his own success on the performance of all the others. But this simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similiar to theirs - in other words the extreme links of a chain conspiracy may have elements of the 'spoke conspiracy.'"

Judge Friendly, writing for the court, found fault with Judge Bonsil's charge and reversed the conviction and remanded for a new trial.

The Borelli conspiracy lasted for 9 years with participants entering and leaving at various times. The Court, in acknowledging the "impeccable logic and impressive authority" in the government's brief, logic and authority which will surely be presented by the government in the case at bar, nevertheless reversed.

The government's arguments in Borelli, could be summarized briefly, as follows:

1. "the conspiracy was continuous as regards at least some of the principals;"

2. "each participant is presumed to have been responsible for all that would ever go on, or that ever had;"

3. "and he could terminate this responsibility only by making a clean breast to the authorities or by informing his collegues (mostly unknown to him) that he was through."

Judge Bonsil's charge was more comprehensive than that given by Judge Frankel in the case at bar, at least with respect to aiding the jury in determining the

nature of the conspiracy. Yet, the court apparently determined that the Borelli court did not adequately guide the jury. A comparison of the two charges would be instructive.

JUDGE BONSIL - BORELLI

> "If you find that the government has failed to prove the existence of one conspiracy, you must find the defendant not guilty. Proof of several separate and independent conspiracies involving various of the defendants, although to violate the same narcotics laws is not proof of the single conspiracy charged in the indictment."
>
> "In determining whether there was a single conspiracy, you may consider what the evidence shows as to changes personnel and activity, but you may (3225) find a single conspiracy even though there were changes in personnel and activities, provided that you find that some of the conspiractors continued throughout the life of the conspiring and that the purposes of the conspiracy continued to those charged in the indictment."
>
> "But on the other hand, if you find that one conspiracy terminated and another one was formed you may not find a single conspiracy, even though the purposes of the conspiracies were the same and that some of the defendants were members of both." 10

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10. Found on page 3225 of the Borelli record.

JUDGE FRANKEL - JERMAIN

> "Count one does charge a single overall conspiracy in order to make out the first of the three essential elements on which I am now instructing you."
>
> "So if the government has not established such a conspiracy, but has established only a variety of different and unconnected conspiracies among different people, there would be a failure of proof as to element 1 under count 1 and you would have to acquit on that count" (3934). 11

Counsel has been unable to find any guidelines in Judge Frankel's charge which would aid the jury with an intelligible criterion for determining the issue of the one versus the many conspiracies. Clearly, under the Borelli decision, this failure constitutes "plain error" and is correctible under Rule 52(b) of the Federal Rules of Criminal Procedure. Rule 52(b) reads, as follows:

> "(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In determining the existance of a single, as opposed to multiple conspiracies, this court has set many, sometimes esoteric rules. It appears, however, that one thread running through all of the decisions seems to be a requirement of meaningful prejudice to a particular, named

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11. The entire charge is set forth in the appendix attached to the Capra, Guarino and Dellacava briefs and has not been reproduced as an appendix by defendant, Jermain.

defendant. Such a situation exists in the case at bar. If in fact, 2 conspiracies are found to exist, then surely, defendant Jermain has been badly prejudiced.

The government's case against Jermain rested on the testimony of Joaquin Ramos. Ramos, as a witness, was extremely vulnerable to impeachment. He was an oft convicted narcotics trafficker. He was given enormous temptation by the government to "cooperate". The record is replete with promises to Ramos which would have been difficult to resist by the most incorruptible of men. Ramos was given a stipend of $834.00 per month, had a 10-20 year sentence by the State of Ohio remitted to "time served", was not prosecuted by the Federal Courts for narcotics violations that would have mandated a substantial minimum sentence upon conviction as a third narcotics offender. (850-853)[12] In addition, there was

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12. Appellant, Jermain, raises the question of whether there is a point at which government promises can be of such a nature as to be improper tampering with a witness. Counsel can find no authority for the proposition and therefore cannot urge this point with vigor. Counsel does not assert that it has been reached in the case at bar, but clearly the point has been approached and the question may someday require examination by this court.

the possibility of further prosecution for parole violation by the government.

The court was mindful of the relative unreliability of testimony from an individual faced with these temptations and pressures. In its charge, it specifically called to the jury's attention these factors (2961-2962). The court then stated,

> "You must ...scrutinize such [accomplice] testimony with particular care and view it with particular caution in determining whether it is credible." (2963)

Clearly, Ramos' testimony needed buttressing; which task fell to Conforti. And he accomplished his job in the most graphic was imaginable. Vivid descriptions of kilos of pure heroin, baroque tales of mixing procedures, exciting recounts of the interchange of enormous sums of money, all implicating Capra, Guarino and Dellacava gave credence to Ramos' testimony as to the same individuals. This testimony, which may have been permissable against some of the defendants, was clearly not relevant as to Jermain, Morris or Harris. Nonetheless, the jury hearing this testimony could not but leap to the faulty but inevitable conclusion that if Ramos was telling the truth about Capra, Guarino and Dellacava (as buttressed by Conforti), then surely Ramos must be telling the truth about Jermain, Harris and Morris.

This type of potential prejudice was vehemently

denounced by this court in U.S. v Russano (1958) 257 F2d 712 CA2; U.S. v. Kelly (1965) 349 F2d 720 CA2; U.S. v Rodriguez sub nom Aviles (1960) 274 F2d 189 CA2; U.S. v Branker (1968) 395 F2d 881 CA2, and by the Supreme Court in U.S. v. Kotteakas, supra.[13] Interestingly, the court in the case at bar recognized the inherent danger in the nature of the proof offered and advised the jury of the limited probity of the Conforti testimony. But, the naive assumptions that the prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.[14] See Krulewitch v U.S. fn 8 supra; Bruton v. U.S. (1968) 391 US 123; U.S. v. Semensohn (1970) 421 F2d 1206.

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13. Judge Rutledge stated in Kotteakas, the oft quoted lines,

> "The dangers of transference of guilt from one to another across the line separating conspiracies, subsequently or otherwise, are so great that no one can say prejudice to substantial rights have not taken place." At p.774.

14. The cautionary instruction is found on page 3940, and reads as follows:

> "First, a conspiracy, once it has been formed is presumed to continue until its objectives are completed or until there is an affirmative act of termination by one or more of its members; or until it is ended in some other way."
>
> "Again, the defendant, Jermain, asserts that nothing after that November date could be deemed to connect him with the conspiracy, and that no evidence of anybody else's actions or statements after that time may be considered against him." [Emphasis supplied]

Returning once more to an analysis of the nature of the conspiracy or conspiracies proven[15], I invite attention to U.S. v. Russano, supra. The Russano case bears certain similarities to the case at bar. There, as here, the conspiracy alleged covered many years. (6 in Russano, 4 in Jermain). There, as here, there was an interruption in the activities of the conspiracy due to the imprisonment of many of the alleged conspirators. In Russano, there was a 2 year hiatus wherein the main conspirators were incarcerated followed by a reactivation of activity by the core members. In the case at bar, there was no resumption of activity by the arrested members. In addition, the disruption was so all-encompassing as to lead one to the irresistable conclusion that the conspiracy ended because of force of circumstances. Recognition should be given to the fact that Ramos, Harris and Morris were incarcerated more than one year before the alleged Sperling-

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15. Mention has heretofore been made of the lack of guidelines from which a jury could determine which defendant belonged to which conspiracy. In Borelli, supra, wherein this court reversed and remanded for that very lack of guidelines, there was no request by counsel for such guidance for the jury. In the case at bar, defendant, Capra, specifically requested that the court charge with respect to criteria.(3972) This request was joined in by defendant, Jermain.(3973)

Conforti-Capra-Guarino union occurred, and no proof shows any continued activity, if indeed there ever was activity, by Jermain.[16] If Capra and Guarino continued their activities, they did so within the framework of a new conspiracy. Despite the resumption of activity by the "core" of conspirators in Russano, this court held that two separate conspiracies existed constituting a prejudicial variance requiring a remand. In the case at bar, there was no resumption of activity by Harris, Morris, Jermain or Ramos. In addition, Jermain had no knowledge of the Capra group's connection with Sperling or Conforti, had no mutuality of interest with them, and was not part of any direct chain of distribution involving Sperling or Conforti.[17]

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16. This court spoke to the issue of withdrawal from a conspiracy in the Borelli case, and stated,

> "Mere proof of past dealings with the core [members does not] suffice to permit a jury to infer an agreement to participate in its continuing activities to the end of time." [Emphasis added]

17. Appellant recognizes that this court has previously held that the exact identity of all the conspirators need not be known to all the co-conspirators, but the co-conspirators must reasonably know about the existence of the other conspirators.

It should be noted that Sperling was not directly part of the distribution network, vis-a-vis Jermain. According to the testimony of Ramos and Conforti, Capra and Guarino were major suppliers and the top link in the chain of distribution. Ramos and Jermain were middlemen and the second link. Harris and Morris were the third. Cirillo, Stromberg, Agueci and other classic "chain" conspiracy cases held that there is no variance where the government can show direct lines of communication from one level of distribution to the next. Where there are collateral links to the chain, however, there is a variance which may prejudice the peripheral members of the conspiracy.

This court has previously rejected the "all or nothing" doctrine, (See U.S. v. Borelli, supra) and has held that a prejudicial variance as to one defendant may not be a prejudicial variance as against another. It would be possible to find that there existed a prejudicial variance in the case at bar as to the peripheral conspirators (Jermain, Morris and Harris), but not as to the core members. See U.S. v. Kelly, supra; U.S. v. Branker, supra.

Clearly, Sperling and Conforti are not in a

direct line of communication, and never were, with any of the defendants except Capra, Guarino and Dellacava. To permit the joinder of Sperling and Conforti as co-conspirators thereby permitting their testimony to be received in this case should logically permit the joinder of all of Sperling's confederates, customers, aides, suppliers and distributees from the original poppy grower in Turkey to the hundreds of users on the streets of any city in the United States where his product may have been distributed. The principle of conspiracy will <u>indeed</u> <u>have</u> expanded itself to the limit of its logic---and far, far beyond.

POINT II

APPELLANT, JERMAIN, ADOPTS BY REFERENCE, ALL ARGUMENTS IN THE CAPRA, GUARINO, DELLACAVA AND MORRIS BRIEFS, WHERE APPLICABLE.

Appellant, Jermain, subscribes generally to all points made by co-appellants. In particular, defendant, Jermain, subscribes to appellant Capra, Guarino and Dellacava's argument with respect to suppression of the seized Toledo narcotics in October, 1971.

Although, appellant, Jermain, denied and denies any knowledge or possessory interest in the seized goods, it is urged that he has "automatic standing" to raise the issue of the legality of the seizure under the authority of Jones v. U.S. (1962) 362 U.S. 257 and Simmons v. U.S. (1968) 390 U.S. 377.

The Supreme Court in Jones established a rule of "automatic" standing to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged.

Appellant, Jermain, is mindful of the recent decision of Brown v. U.S. (1973) 36 L Ed 2d 208; 93 S.Ct___. and urge that Brown is not apposite to the case at bar.

It is further urged that should this court remand as to appellants Capra, Guarino and Dellacava on the

issue of the seized Toledo narcotics, then it must remand as to Jermain. If it was error to permit the narcotics to be introduced at a joint trial involving the Capra Group and defendant Jermain, then clearly the Jermain case would have been severed or the drugs would not have been permitted into evidence. In either event, Appellant Jermain, would have benefitted from the suppression and the error should warrant a new trial for Appellant, Jermain. The suppression issue is developed at greater length in the briefs previously described.

CONCLUSION

APPELLANT, JERMAIN'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED TO THE TRIAL COURT FOR A NEW TRIAL.

Respectfully Submitted,

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Appellant, ROBERT JERMAIN
11 Park Place
New York, New York 10007

Dated: New York, New York
April 1, 1974.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-v-

JOHN CAPRA, a/k/a "Hooks",
LEOLUCA GUARINO, a/k/a "Spike",
STEPHEN DELLACAVA, a/k/a "Beansy",
JOHN CARUSO,
ROBERT JERMAIN, a/k/a "Frank",
GEORGE HARRIS, a/k/a "Cincinnati",
EARL SIMMS,
ALAN MORRIS, a/k/a "Underworld",
JOSEPH MESSINA,
JACK BROWN and CARMELO GARCIA,
a/k/a "Chino",

Defendants.

INDICTMENT

S 73 CR.460

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The Grand Jury charges:

1. From on or about the 1st day of July, 1969 and continuously thereafter up and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere JOHN CAPRA, a/k/a "Hooks," LEOLUCA GUARINO, a/k/a "Spike", STEPEHN DELLACAVA, a/k/a "Beansy", JOHN CARUSO, ROBERT JERMAIN, a/k/a "Frank", GEORGE HARRIS, a/k/a "Cincinnati", EARL SIMMS, ALAN MORRIS, a/k/a "Underworld", JOSEPH MESSINA, JACK BROWN and CARMELO GARCIA, a/k/a "Chino", the defendants and Herbert Sperling, Willie Middlebrook, Harold McSpadden, Joseph Conforti, Jack Spada, Joaquin Ramos, a/k/a "Gino", Horace Stanley

Marabel, Jimmy Rosa and Louis Oliveras, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violated Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A).

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would sell, barter, exchange and give away narcotic drugs, the exact amount thereof being to the Grand Jury unknown, not in pursuance of a written order of the person or persons to whom such narcotic drugs were sold, bartered, exchanged and given away on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, contrary to law, in violation of Sections 4705(a) and 7237(b), Title 26, United States Code.

3. It was further part of said conspiracy that the said defendants and co-conspirators unlawfully, wilfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about November 5, 1970, defendants ROBERT JERMAIN, a/k/a "Frank", EARL SIMMS, GEORGE HARRIS, a/k/a "Cincinnati" and con-conspirator Joaquin Ramos met at Tom's Villabianca Restaurant, Bronx, New York.

2. On or about November 5, 1970, co-conspirator Joaquin Ramos met in the Bronx, New York with defendant STEPHEN DELLACAVA, a/k/a "Beansy" and negotiated for the sale of a quantity of heroin.

3. In or about May, 1971, co-conspirator Joaquin Ramos met with defendant JOHN CAPRA, a/k/a "Hooks", and LEOLUCA GUARINO, a/k/a "Spike".

4. In or about October, 1971, co-conspirator Joaquin Ramos had a discussion with defendants JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", and STEPHEN DELLACAVA, a/k/a "Beansy" concerning the sale of six kilograms of heroin and one kilogram of cocaine.

5. In or about September, 1971, defendant ALAN MORRIS, a/k/a "Underworld", and co-conspirator Willie Middlebrook brought approximately $150,000 in United

States Currency to the Lincoln Motor Inn, New York, New York.

6. On or about January 17, 1972, co-conspirator Louis Oliveras had a conversation with defendant LEOLUCA GUARINO, a/k/a "Spike" concerning the sale of one half kilogram of heroin.

7. In or about March, 1973, defendants JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", JOHN CARUSO and co-conspirators Herbert Sperling, Jack Spada and Joseph Conforti went to the vicinity of the Stage Delicatessen, 7th Avenue and 54th Street, New York, New York.

8. In or about April, 1973, defendant JOHN CARUSO transported approximately six kilograms of heroin to a motel on Long Island, New York.

(Title 26, United States Code, Section 7237(b) and Title 21, United States Code, Section 846).

COUNT TWO

The Grand Jury further charges:

In or about the month of August, 1970, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, and co-conspirator Joaquin Ramos, a/k/a "Gino", unlawfully, wilfully and knowingly did sell, barter, exchange and give

away to Alan Morris, a/k/a "Underworld", approximately two kilograms of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Alan Morris, a/k/a "Underworld", on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United States Code; Title 18, United States Code, Section 2).

COUNT THREE

The Grand Jury further charges:

On or about the 6th day of November, 1970, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to George Harris, a/k/a "Cincinnati" approximately one kilogram of heroin, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said George Harris, a/k/a "Cincinnati" on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, United States Code, Sections 4705(a) and 7237(b); Title 18, United States Code, Section 2).

COUNT FOUR

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A): Title 18, United States Code, Section 2).

COUNT FIVE

The Grand Jury further charges:

In or about the month of October, 1971, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy" and ROBERT JERMAIN, a/k/a "Frank", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SIX

The Grand Jury further charges:

On or about the 17th day of January, 1972, in the Southern District of New York, JOHN CAPRA, a/k/a "Hooks", LEOLUCA GUARINO, a/k/a "Spike", STEPHEN DELLACAVA, a/k/a "Beansy", and CARMELO GARCIA, a/k/a "Chino", the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney